

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



**FILED**  
7-21-16  
04:59 PM

In the Matter of the Application of  
SOUTHERN CALIFORNIA EDISON  
COMPANY (U338E) for a Certificate of  
Public Convenience and Necessity for the  
West of Devers Upgrade Project and for an  
Interim Decision Approving the Proposed  
Transaction Between Southern California  
Edison and Morongo Transmission LLC.

Application 13-10-020  
(Filed October 25, 2013)

**OPENING COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES ON  
THE ALTERNATE PROPOSED DECISION OF PRESIDENT PICKER  
GRANTING A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY  
FOR THE WEST OF DEVERS UPGRADE PROJECT AND RELATED MATTER**

**I. INTRODUCTION**

Pursuant to Rule 14.3(a) of the Commission's Rules of Practices and Procedure (Rules), the Office of Ratepayer Advocates (ORA) submits the following comments on the Alternate Proposed Decision (APD) of President Picker granting the Certificate of Public Convenience and Necessity (CPCN) for the West of Devers Upgrade Project (WODUP) and related matter. The APD changes the Proposed Decision (PD) in a manner that adds to the legal and factual errors in the PD. Therefore, ORA recommends that the Commission deny the APD because it is contrary to law and not based on the record.

**II. PROCEDURAL CONTEXT**

On April 11, 2016, the Commission issued the PD granting the CPCN for WODUP and related matter. Parties filed opening and reply comments on May 2, 2016 and May 7, 2016, respectively. In its comments, Southern California Edison Company (SCE) requested that certain environmental mitigation measures (MM) required in the Final Environmental Impact Report (FEIR) be revised to make them inapplicable to the

project, should SCE become a Participating Special Entity (PSE) under the Multiple Species Habitat Conservation Plan (MSHCP). SCE maintained that it would be redundant for the Commission to require that SCE undertake MMs that also fall under the MSHCP, because SCE would be subject to those measures again once SCE becomes a PSE.

MSHCP was established to reduce piecemeal, uncoordinated efforts by applicants and delays by multiple agencies to mitigate the effects of development on wildlife, by providing a coordinated plan for the conservation and implementation of programs to preserve the biological diversity of a covered region<sup>1</sup>.

On May 13, 2016, Administrative Law Judge (ALJ) Yacknin issued a ruling directing SCE to file supplemental comments addressing its request to revise the MMs that would be subject to MSHCP. The ruling allowed other parties the discretion to address these issues as well. SCE filed the supplemental comments on May 19, 2016. No other party responded.

On June 9, 2016, the PD was revised to address SCE's request regarding the MMs covered under the MSHCP. The PD denied SCE's request to make the MMs inapplicable, stating "[w]e decline to make the requested revisions because it is not apparent that these mitigation measures overlap or conflict with surveys and avoidance measures under the MSHCPs."<sup>2</sup>

However, the APD adopts SCE's recommendations to revise these same MMs and make them inapplicable<sup>3</sup>. The specific MMs at issue are: WIL-2c, WIL-2d, WIL-2e, and WIL-2j (conduct surveys and avoidance for threatened and endangered riparian birds, Stephens Kangaroo rat, coastal California gnatcatcher and special-status small mammals).

---

<sup>1</sup> Alternate Proposed Decision Granting Certificate of Public Convenience and Necessity for the West of Devers Upgrade Project and Related Matter, p. 32 (Hereinafter, cited as "APD").

<sup>2</sup> Proposed Decision Granting Certificate of Public Convenience and Necessity for the West of Devers Upgrade Project and Related Matter, p. 30 (Hereinafter, cited as "PD").

<sup>3</sup> In all other respects, the PD and the APD are identical, and ORA's comments on the PD remain applicable to the APD in those instances that it does not differ from the PD.

### **III. THE APD COMMITS FACTUAL AND LEGAL ERRORS IN REVISING MITIGATION MEASURES WIL-2c, WIL-2d, WIL-2e AND WIL-2j AS REQUESTED BY SCE**

The Commission cannot relinquish its independent duty under the California Environmental Quality Act (CEQA) to mitigate a significant potential environmental impact when feasible, by declaring that another agency has plans to undertake the same responsibility at a later stage in the development of the project. In addition, the APD commits legal error in failing to make the requisite statutory findings under CEQA, regarding the measures.

The APD relies on speculation and facts that are not in the record to revise the MMs as requested by SCE. Further, SCE's request to revise the MMs was a collateral attack on the certified CEQA document and beyond the scope of this proceeding.

#### **A. The Commission Cannot Relinquish Its Duty Under CEQA To Mitigate Potential Significant Environmental Impacts When Feasible**

In revising MMs WIL-2c, WIL-2d, WIL-2e, and WIL-2j, upon the grounds that they are covered by the MSHCPs, the APD ignores the Commission's statutory obligation to require that potential significant environmental impacts must be mitigated when feasible before the project is authorized or carried out, unless certain conditions are met and findings are made.<sup>4</sup> As requested by SCE and adopted by the APD, the issue is the delegation to another agency that has the appropriate jurisdiction and responsibility. The PD correctly noted that the Commission does not have the legal authority to delegate its independent responsibility under CEQA to other wildlife agencies<sup>5</sup>.

Public Resource Code §21081 in its entirety states:

*[N]o public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:*

---

<sup>4</sup> See Public Resources Code, §21081.

<sup>5</sup> See PD, p. 31.

(a) The public agency makes one or more of the following findings with respect to each significant effect:

(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.

(2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.

(3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

(b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment<sup>6</sup>. [Emphasis added.]

Even if the Commission has legitimately found that “changes or alterations [to the certain MMs] are within the responsibility and jurisdiction of another agency and have been, or can and should be, adopted by that other agency”, the Commission must make specific findings required by statute<sup>7</sup>.

The APD did not make any findings regarding the MMs it revised in response to the SCE request and consequently, did not make a statement of overriding considerations that the benefits outweigh the significant effects on the environment. Therefore, the APD was erroneous as a matter of law.<sup>8</sup> CEQA’s statutory findings are not discretionary; they are a legal responsibility that informs future project developments and other public

---

<sup>6</sup> Public Resources Code, §21081.

<sup>7</sup> Public Resources Code, §21081(a)(2).

<sup>8</sup> See *City of Marina v. Board of Trustees of the Cal. State Univ.* (2006) 39 Cal.4<sup>th</sup> 341, 355.

agencies of the Commission's important role as a lead agency. As the Supreme Court noted in *Cal. Mfg. Association v. Public Utilities Commission*.<sup>2</sup>

Findings are essential to "afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the Commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the Commission avoid careless or arbitrary action." <sup>10</sup>

While the Supreme Court in *Cal. Mfg. Association v. Public Utilities Commission*, *supra*, was discussing Commission findings in a decision, the same reasoning applies when statutory findings are required by one of the most important statutes in the State.<sup>11</sup>

**B. The APD Relies on Speculation and Facts Outside the Record to Revise the MMs Requested by SCE**

The ALJ's revisions to the PD on June 9, 2016 accurately describes SCE's request to revise MMs WIL-2c, WIL-2d, WIL-2e and WIL-2j as unsupported by the evidence and speculative at best. Even after SCE's thirty-two page supplemental comments<sup>12</sup>, the PD held that "it is not apparent that these mitigation measures overlap or conflict with surveys and avoidance measures under the MSHCPs."<sup>13</sup>

Further, the revisions to the PD conclude that it would be speculative for the Commission to revise the MMs for the reasons stated by SCE.

---

<sup>2</sup> 24 Cal.3d 253, 259 (Cal. 1979).

<sup>10</sup> *Id.*, Headnote 4, citing *Greyhound Lines Inc. v. Public Utilities Com.*, 65 Cal.2d 811, 813 [56 Cal. Rptr. 484, 423 P.2d 556]; *Toward Utility Rate Normalization v. Public Utilities Com.* (1978) 22 Cal.3d 529, 537 et. seq. [149 Cal. Rptr. 692, 585 P.2d 491].

<sup>11</sup> See Cal. Public Res. Code §21000.

<sup>12</sup> Rule 14(b) of the Commission's Rules of Practices and Procedure, provides that "[e]xcept in general rate cases, major plant addition proceedings, and major generic investigations, comments shall be limited to 15 pages in length." SCE's had already filed Opening Comments of about 15 pages.

<sup>13</sup> PD, p. 30.

In the meantime, we do not presume that the wildlife agencies grant of incidental take authority will satisfy our independent responsibility under CEQA to require feasible mitigation to avoid or reduce direct take of covered animals.<sup>14</sup>

**1. SCE's Supplemental Comments Are Not Evidence.**

The APD concedes that it relied on new evidence in SCE's comments to revise the MMs as requested by SCE.

SCE re-iterates, in a table contained as an appendix to its opening brief, it recommended revisions to specific mitigation measures that it had submitted in its comments on the draft EIR. While the appendix failed to sufficiently inform the matter ...<sup>15</sup>

This is legal error. Neither the appendix attached to SCE's opening brief nor SCE's comments to the PD should suffice to inform the record with new evidence. Rule 14.3(c) provides that "[c]omments shall focus on factual, legal or technical errors in the proposed or alternate decision and in citing such errors shall make specific references to the record or applicable law." SCE made no reference to the record evidence to support its recommendations for revision of the MMs.

Indeed, SCE could not have made such reference to the record evidence because the recommendations to revise the MMs constitute a collateral attack on the certified CEQA document, and was outside the scope of evidentiary hearings<sup>16</sup>. The Scoping Memo noted that determining whether there are "significant adverse environmental impacts of the proposed project" is an issue in the proceeding, but held that the Commission would limit the determination of the issue to the four corners of the CEQA document.

However, they are properly addressed in the course of the CEQA environmental review process and preparation of the EIR/EIS [Environmental Impact Report/Environmental Impact Statement]. To the extent any party or member of the

---

<sup>14</sup> PD, p. 31.

<sup>15</sup> APD, p. 30.

<sup>16</sup> Assigned Commissioner's Scoping Memo, August 24, 2015, pgs. 4-5.

public wishes to present evidence on these issues, they should do so in the course of that environmental review process in the form of the comment on the draft EIR/EIS. The final EIR/EIS, will include such comments and respond to them. Upon completion of the final EIR/EIS, Energy Division shall submit it to the ALJ for admission into the evidentiary record and review and consideration by the Commission. *No evidentiary hearing or further evidence is needed on this issue.* [Emphasis added.]<sup>17</sup>

Having barred all parties from introducing any evidence at the hearing or cross examining witnesses on the issue, the Commission cannot then allow SCE to present new evidence upon which the Commission relies to change the CEQA document. In *Southern California Edison Co. v. Public Utilities Commission*,<sup>18</sup> the Court of Appeals held that the Commission's Rules of Practices and Procedure have the force of law, and the Commission's failure to follow said rules is a violation of law. The Court in *Southern California Edison v. Public Utilities Commission* was addressing a situation where the Commission even amended the scoping memo in a rulemaking without giving parties adequate opportunity to address the new issues. Thus, the Court stated: "The PUC's failure to comply with its own rules concerning the scope of issues to be addressed in the proceeding therefore was prejudicial."<sup>19</sup>

In this case, the evidence in the record fully contradicts SCE's claim that the measures conflict with, or are rendered redundant by the MSHCPs. As the PD noted in rejecting SCE's request to revise the mitigation measures, the surveys that the EIR mitigation measures require are in addition to the MSHCPs. These EIR mitigation surveys cover preconstruction and during construction stages and help avoid direct impact of the project construction activities on specimen that are actually determined to be on site, while the MSHCP surveys are planning and siting stage surveys that are much farther removed from the actual construction activities.

---

<sup>17</sup> *Id.*, p. 5.

<sup>18</sup> (2006) 140 Cal.App.4<sup>th</sup> 1085, 1106.

<sup>19</sup> *Id.*, p. 1142.

SCE asks the Commission to revise Mitigation Measures WIL-2c, WIL-2d, WIL-2e, and WIL-2j ...to provide that they will no longer apply in the event that SCE becomes a Participating Special Entity (PSE) under the applicable Multiple Species Habitat Conservation Plans (MSHCP). SCE asserts that, otherwise, these mitigation measures will cause unnecessary duplication, conflict, and ratepayer expense with respect to the conduct of surveys and avoidance of these species under the MSHCPs. We decline to make the requested revisions because it is not apparent that these mitigation measures overlap or conflict with surveys and avoidance measures under the MSHCPs.

Specifically, the surveys conducted under the MSHCPs are conducted (if required) during project planning and siting as part of the PSE application process, for the purpose of assessing the project's expected "incidental take" of covered species for which the applicant requires "take authorization" from the US Fish and Wildlife Service and California Department of Fish and Game. (See, e.g., Western Riverside MSHCP Implementing Agreement, § 11.8.2.) Indeed, as SCE points out, surveys are not required for 104 of the 146 covered species, but are presumed to be present for this purpose. (SCE supplemental comments, p. 6, citing to Western Riverside MSCHP, Appendix E at E-1.) In contrast, the surveys required by the EIR's mitigation measures are pre-construction and during construction, for the purpose of determining the presence and location of specimen in order to avoid direct impacts to them during construction.

Similarly, although the MSHCPs include best management practices and construction guidelines for mitigating incidental disturbance to species (see Western Riverside MSHCP, § 7.5.3 and Appendix C at IC-1 to IC-3), they do not include additional measures to avoid direct impacts to specimen that are known to be present in the area (in large part because, as indicated above, the MSHCPs do not require pre-construction or construction surveys to locate them)<sup>20</sup>.

The PD's response to SCE's request to revise MMs WIL-2c, WIL-2d, WIL-2e and WIL-2j is the appropriate response, and the APD should adopt the same response as well.

---

<sup>20</sup> PD, pgs. 30-31



The Commission lacks both the authority and the requisite record to revise these measures in the CEQA document for this proceeding.

Respectfully submitted,

/s/ NOEL OBIORA  
NOEL OBIORA

Attorney for  
Office of Ratepayer Advocates

California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102  
Telephone: (415) 703-5987  
Email: [noel.obiora@cpuc.ca.gov](mailto:noel.obiora@cpuc.ca.gov)

July 21, 2016